

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**TRAFFIC MARKINGS, INC.,  
  
Respondent.**

**Docket No. FMCSA-2009-0187<sup>1</sup>  
(Eastern Service Center)**

**ORDER ON BINDING ARBITRATION**

**1. Background**

On April 23, 2009, the Massachusetts Division Administrator for the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) to Respondent, Traffic Markings, Inc., proposing a civil penalty of \$38,410 for 31 alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Specifically, the NOC, which stated that it was based on a March 31, 2009 compliance review, charged Respondent with: (a) two violations of 49 CFR 382.305(b)(1), with a proposed civil penalty of \$2,090 per count, for failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions; (b) eight violations of 49 CFR 382.305(b)(2), with a proposed civil penalty of \$2,090 per count, for failing to conduct random controlled substances testing at an annual rate of not less than the applicable rate of the average number of driver positions; (c) one violation of 49 CFR 391.45(b)(1)/391.11(a), with a proposed civil penalty of \$1,340, for using a driver not medically examined and certified during the preceding 24 months; (d) five violations of 49 CFR 391.51(b)(2), with a proposed civil penalty of \$660 per count, for

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<sup>1</sup> The prior case number of this matter was MA-2009-0058-US0536.

failing to maintain inquiries into a driver's driving record in the driver's qualification file; (e) five violations of 49 CFR 391.51(b)(7), with a proposed civil penalty of \$660 per count, for failing to maintain a medical examiner's certificate in the driver's qualification file; (f) four violations of 49 CFR 396.3(b), with a proposed civil penalty of \$660 per count, for failing to keep minimum records of inspection and vehicle maintenance; (g) three violations of 49 CFR 396.11(a), with a proposed civil penalty of \$750 per count, for failing to require a driver to prepare a driver vehicle inspection report; and (h) three violations of 49 CFR 396.17(a), with a proposed civil penalty of \$1,560 per count, for using a commercial motor vehicle not periodically inspected.<sup>2</sup>

Respondent replied to the NOC on May 22, 2009, requesting binding arbitration, but not specifically admitting or denying any of the charges.<sup>3</sup> In accordance with the revised Rules of Practice, any allegation not specifically denied is considered admitted.<sup>4</sup> On July 8, 2009, Claimant, the Field Administrator for FMCSA's Eastern Service Center, stated he did not object to the request. The request is granted.

## **2. Procedures**

The arbitration process will be conducted pursuant to FMCSA's published guidance on this subject.<sup>5</sup> The parties will work together to select an arbitrator and establish procedures that will govern the binding arbitration. A representative of FMCSA will contact Respondent to answer any questions it may have about the process, including

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<sup>2</sup> See Attachment 2 to letter of July 8, 2009, from Claimant's Counsel (Claimant's Consent).

<sup>3</sup> See Attachment 1 to Claimant's Consent.

<sup>4</sup> See 49 CFR 386.14(d)(1)(i)

<sup>5</sup> See *Guidance for the Use of Binding Arbitration under the Administrative Dispute Resolution Act of 1996*, Docket No. FMCSA-2003-14794, 69 Fed. Reg. 10288, March 4, 2004.

the choosing of an arbitrator.

a. Options in Choosing the Arbitrator

The parties may choose an arbitrator from the following sources:

1. Civilian Board of Contract Appeals Judges or representatives from other government agencies who have been trained in arbitration;
2. Uncompensated neutral parties from local communities; or
3. Compensated neutral parties from outside the government, whose costs are to be shared by agreement of the parties.

The selected arbitrator will assist the parties in developing procedures and preparing an Arbitration Agreement.

b. Arbitration Format

Respondent may have attorney or non-attorney representation, or it may appear *pro se*, that is, it may represent itself in the arbitration proceedings. With the consent of both parties, the arbitrator may conduct hearings in person or by telephone, video conferencing, or computer.

Each party will present evidence supporting the penalty and terms of payment it considers appropriate. The evidence may not contest whether or not the violation occurred because Respondent has conceded the violation as a condition of arbitration. Neither written submissions nor oral argument may contain any reference to the amount of the civil penalty proposed by the party. At a time specified by the arbitrator, each party will present to the arbitrator and to the opposing party a sealed envelope containing the amount of its total proposed civil penalty and a proposed payment plan. Before opening the envelopes, the arbitrator will determine the appropriate civil penalty and

payment plan based upon the evidence presented during the proceeding. The arbitrator will provide his or her determinations in writing to the parties. The arbitrator will then open the envelopes and select the civil penalty and payment plan that is closer to the arbitrator's determinations. The arbitrator has the discretion to select one party's proposed total civil penalty and the other party's proposed payment plan.

c. Maximum and Minimum Penalty Amounts

The parties may not propose an amount higher than the amount assessed in the NOC. There is no minimum statutory penalty for the violation.

d. Limited Appeals

The arbitration award is binding on the parties. Appeals from arbitration awards are generally limited to fraud or misconduct in the proceedings. *See* Federal Arbitration Act, 9 U.S.C. § 10.

*It Is So Ordered.*



Rose A. McMurray  
Assistant Administrator  
Federal Motor Carrier Safety Administration

4.15.10  
Date



# CERTIFICATE OF SERVICE

This is to certify that on this 16 day of April, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Timothy Langevin, Corporate Secretary  
Traffic Markings, Inc..  
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Franklin, MA 02038  
Phone: (508) 528-5727

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